

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF NEW YORK

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4 AIRCRAFT OWNERS AND PILOTS

5 ASSOCIATION, et al.,

6 Plaintiffs,

7 -versus-

06-CV-1468

8 (MOTION)

9 ANDREW M. CUOMO, et al.,

10 Defendants.

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15 TRANSCRIPT OF PROCEEDINGS held in and for the

16 United States District Court, Northern District of New York,

17 at the James T. Foley United States Courthouse, 445 Broadway,

18 Albany, New York 12207, on THURSDAY, AUGUST 2, 2007, before

19 the HON. GARY L. SHARPE, United States District Court Judge.

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2 APPEARANCES:

3 FOR THE PLAINTIFFS:

4 WHITEMAN, OSTERMAN & HANNA

5 BY: HOWARD LEVINE, ESQ.

6 ALAN JAY GOLDBERG, ESQ.

7 -and-

8 YODICE ASSOCIATES

9 BY: KATHLEEN A. YODICE, ESQ.

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12 FOR THE DEFENDANTS:

13 HON. ANDREW M. CUOMO, New York State Attorney General

14 BY: DOUGLAS J. GOGLIA, Assistant Attorney General

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Aiport Owners/Pilots v. Cuomo, et al. - 06-CV-1468

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1 (Court commenced at 9:05 AM.)

2 THE CLERK: The date is Thursday, August 2,
3 2007, at 9:05 AM. In the matter of Airport Owners and
4 Pilots Association, et al., versus Andrew M. Cuomo, et al.,
5 06-CV-1468. We are here for a motion hearing. Can we have
6 appearances for the record, please?

7 MR. GOGLIA: Sir, Douglas Goglia, Assistant
8 Attorney General, for the defendants.

9 THE COURT: Good morning.

10 MR. GOGLIA: Good morning.

11 MR. LEVINE: And Howard Levine and Alan
12 Goldberg and Kathy Yodice for the plaintiffs.

13 THE COURT: Good morning.

14 MR. LEVINE: Good morning.

15 THE COURT: Be seated if you would,
16 Mr. Levine.

17 MR. LEVINE: Thank you.

18 THE COURT: This is a challenge to 251-b and
19 -c of the General Business Law, a statute which was passed
20 in 2006, ostensibly to enhance heightened security against
21 aviation terrorism. The statute requires any flight school
22 or other entity in the state that supplies flight
23 instruction training to obtain the fingerprints of any
24 applicant and then submit that person's fingerprints, name
25 and other identifying data to the State Division of Criminal

Aiport Owners/Pilots v. Cuomo, et al. - 06-CV-1468

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1 Justice Services for a criminal background check.

2 And it's your view, is it not, that according
3 to the doctrine of implied preemption, both field and
4 conflict, the Court ought to grant your motion for summary
5 judgment or declaratory judgment under 28, 2201?

6 MR. LEVINE: Exactly. And we all agree that
7 there's no issue of fact here. It's a pure issue of law.

8 THE COURT: Thank you.

9 MR. LEVINE: The plaintiff --

10 THE COURT: I've heard all I need,
11 Mr. Levine. You can sit down.

12 MR. LEVINE: Thank you very much.

13 THE COURT: All right. Mr. Goglia, why is he
14 wrong?

15 MR. GOGLIA: Judge, I would suggest, your
16 Honor, that while the Federal Administration -- Aviation Act
17 is very broad, it does not conflict with the state statute
18 and the state statute merely supplements what is a very
19 obvious gap in the federal legislative regime. And while
20 the Federal Government certainly has the door opened and can
21 go through it and supply legislation which would fill the
22 submission and require background checks for citizens as
23 well as noncitizens, it has yet to do so.

24 THE COURT: It's true that a number of
25 federal agencies wrote the legislature and suggested they

Aiport Owners/Pilots v. Cuomo, et al. - 06-CV-1468

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1 not pass the legislation.

2 MR. GOGLIA: State agencies, Judge?

3 THE COURT: No, federal agencies.

4 MR. GOGLIA: The state agencies --

5 THE COURT: Didn't the New York State
6 Legislature receive correspondence from federal agencies
7 saying this field's preempted and you ought not legislate
8 here?

9 MR. GOGLIA: It did, your Honor.

10 THE COURT: I am not suggesting to you that
11 federal agencies bind state agencies.

12 MR. GOGLIA: No, Judge. I worked for federal
13 agencies for many years before joining state government and
14 one thing the federal agencies are good for is protecting
15 and expanding their jurisdiction.

16 THE COURT: Right.

17 MR. GOGLIA: I'm not surprised that they
18 cried to the state government or the state legislation is
19 somehow preempted. I don't think that's binding on this
20 Court, though, and I think the Court is in a better position
21 to make that determination as a matter of law.

22 THE COURT: What else do you want to add?

23 MR. GOGLIA: I have nothing I need to add,
24 Judge. Everything is briefed, unless you have questions of
25 me.

Aiport Owners/Pilots v. Cuomo, et al. - 06-CV-1468

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1 THE COURT: You don't disagree that really
2 this entire case should be disposed of as a matter of law
3 based on the papers submitted to me. It's either preempted
4 or not.

5 MR. GOGLIA: I absolutely agree, your Honor.

6 THE COURT: And whoever disagrees with
7 whatever decision I render, either of you, feel free to take
8 it up to the Circuit, which is a far greater authority than
9 am I.

10 MR. GOGLIA: I have no objection to that,
11 your Honor.

12 MR. LEVINE: Not necessarily greater wisdom,
13 your Honor.

14 THE COURT: That depends on who wins.

15 (Laughter.)

16 THE COURT: Thank you.

17 MR. GOGLIA: Thank you, Judge.

18 THE COURT: I didn't mean to cut the parties
19 off, but I have, as I always do, read the submissions and it
20 was clear to me, having read the submissions, that this has
21 been fully and fairly presented in those submissions. And I
22 don't want to cut anybody off, but it was my sense that
23 there really was nothing more to add to what was said, and I
24 think the facts for the Circuit's benefit are essentially
25 these, and I am applying a standard -- have we shared an

Aiport Owners/Pilots v. Cuomo, et al. - 06-CV-1468

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1 exhibit with the parties, John?

2 THE CLERK: Yes.

3 THE COURT: I share an exhibit with you at
4 the beginning so I don't bore you by reciting that into the
5 record, but I incorporate that into the record of the
6 proceedings and that's the standard I'm employing.

7 (INSERT:

8 Summary judgment shall be granted "if the
9 pleadings, depositions, answers to interrogatories and
10 admissions on file, together with the affidavits, if any,
11 show that there is no genuine issue as to any material fact
12 and that the moving party is entitled to judgment as a
13 matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S.
14 242, 247 (1986) (citing Fed.R.Civ.P. 56(c)); Globecon Group,
15 LLC v. Hartford Fire Ins. Co., 434 R.3d 165, 170 (2d Cir.
16 2006) (citation omitted). All reasonable inferences must be
17 drawn in favor of the nonmoving party. See Allen v.
18 Coughlin, 64 F.3d 77, 79 (2d Cir. 1995). The moving party
19 "bears the initial responsibility of informing the district
20 court of the basis for its motion, and identifying those
21 portions of 'the pleadings, depositions, answers to
22 interrogatories, and admissions on file, together with the
23 affidavits, if any,' which it believes demonstrate the
24 absence of a genuine issue of material fact." Celotex
25 Corp. v. Catrett, 477 U.S. 317, 323 (1986) (citation

1 omitted); see also SEC v. Kern, 425 F.3d 143, 147 (2d Cir.
2 2005). "A 'genuine' dispute over a material fact only
3 arises if the evidence would allow a reasonable jury to
4 return a verdict for the nonmoving party." Dister v. Cont'l
5 Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988) (citation
6 omitted). However, "[c]onclusory allegations, conjecture
7 and speculation...are insufficient to create a genuine issue
8 of fact." Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir.
9 1998).

10 END INSERT.)

11 THE COURT: On August 16th of '06,
12 Governor Pataki signed New York General Business Law
13 Sections 251-b and -c into law. The new law was effective
14 on October 15th of '06. The new law requires that all new
15 or prospective applicants for flight instruction at any
16 New York aeronautical facility, flight school or institution
17 of higher learning offering air or flight instructions
18 submit to a criminal background check by the New York State
19 Division of Criminal Justice Services, DCJS, before starting
20 any flight training.

21 The law also requires that any flight school
22 shall receive and review the information and consider
23 whether or not to admit the applicant in accordance with
24 New York Corrections Law Article 23-A. The new law also
25 requires the Commissioner of the DCJS to consider the

1 criminal history information and determine whether or not to
2 grant clearance for flight instruction.

3 As I've said, the parties have cross-moved
4 for summary judgment and as I've said, the plaintiffs seek a
5 declaration from the Court that that law is
6 unconstitutional, essentially arguing two things, both under
7 the doctrine of implied preemption: One, field preemption;
8 and the second, conflict preemption.

9 Let me address the preemption doctrine. The
10 power of Congress to preempt state law derives from the
11 Supremacy Clause of Article VI of the Constitution, which
12 provides that the laws of the United States shall be the
13 supreme law of the land, anything in the Constitution or
14 laws of any state to the contrary notwithstanding.

15 Consideration of issues arising under the
16 Supremacy Clause starts with the assumption that the
17 historic police powers of the states are not to be
18 superseded by Federal Act unless that is the clear and
19 manifest purpose of Congress. The Supreme Court has
20 cautioned that despite the variety of these opportunities
21 for federal preeminence, we have never assumed lightly that
22 Congress has derogated state regulation, but instead have
23 addressed claims of preemption with the starting presumption
24 that Congress does not intend to supplant state law.
25 That's New York State Conf. of Blue Cross & Blue Shield,

1 514 U.S. 645.

2 Preemption may be express or implied. Here,
3 we're dealing with the issue of implying preemption.
4 There's nothing in the statute which is expressed in the
5 federal law. There are two categories of implied
6 preemption: Field preemption and conflict preemption. The
7 Supreme Court has described implied preemption as follows:

8 Congress implicitly may indicate an intent to
9 occupy a given field to the exclusion of state law. Such a
10 purpose properly may be inferred where the pervasiveness of
11 the federal regulation precludes supplementation by the
12 states where the federal interest in the field is
13 sufficiently dominant or where the object sought to be
14 obtained by the federal law and the character of obligations
15 imposed by it reveal the same purpose. That's Rice, 331
16 U.S. 218.

17 Even where Congress has not entirely
18 displaced state regulation in a particular field, state law
19 is preempted when it actually conflicts with federal law.
20 The concept of implied preemption, as applied, renders
21 pigeonholing of that concept sometimes difficult. First
22 Circuit recognized as much in French, 869 F.2d at 1. If the
23 state law disturbs too much the constitutionally declared
24 scheme, whether denominated as occupying the field or
25 actually conflicting with federal law, it will be displaced

1 through the force of preemption. Again, that's French; this
2 time, at 2.

3 The Federal Aviation Act of 1958 was passed
4 by Congress for the purpose of centralizing in a single
5 authority -- indeed, in one administrator -- the power to
6 frame rules for the safe and efficient use of the nation's
7 airspace. That's Airline Pilots Association Int'l, 276 F.2d
8 892, Second Circuit. The House Report accompanying the FAA
9 indicated that one of the purposes of the Act is to give the
10 administrator of the new Federal Aviation Agency full
11 responsibility and authority for the advancement and
12 promulgation of civil aeronautics generally, including
13 promulgation and enforcement of safety regulations. That's
14 the House Report, Number 2360. In addition, in a letter
15 included as part of the House Report, the Airways
16 Modernization Board Chairman wrote, "It is essential that
17 one agency of government, and one agency alone, be
18 responsible for issuing safety regulations if we are to have
19 timely and effective guidelines for safety in aviation."

20 It's undisputed here, as I've already noted,
21 that Congress has not expressly preempted states from
22 regulating all aspects of air safety. The dispute in this
23 case arises out of a lack of authority in this Circuit, and
24 around the nation in general, on whether a state can
25 regulate pilot school enrollment. AOPA contends that the

1 law is preempted because Congress has occupied the field,
2 but also the law conflicts with the intent of Congress to
3 have one authority in the area of pilot qualifications.

4 On the one hand, some Circuits -- namely, the
5 First and Third -- have found that Congress has intended to
6 occupy the field on the issue of pilot qualification and
7 duty of care, respectively. In the Eleventh Circuit,
8 speaking on the issue of criminal prosecution, the state is
9 not preempted.

10 While there are many cases examining various
11 aspects of preemption in the area of air safety, there is no
12 case directly on point. I can quickly note, because the
13 parties have briefed these issues and understand what these
14 cases say and don't say, that the First Circuit has
15 generally said in the interest of air safety, the Act
16 assigns the overall responsibility for prescribing rules
17 governing such matters as pilot qualification to the federal
18 Secretary of Transportation. They did that in French that
19 I've already cited.

20 The Third Circuit found implied field
21 preemption in the applicable standards of care in the field
22 of air safety generally. They did that in Abdullah, 181
23 F.3d 363 at 367. Arguably, as I've said, the Eleventh
24 Circuit has held to the contrary in Hughes at 377 F.3d 1258.

25 On November 19th of 2001, Congress legislated

1 a transfer of responsibility for aviation security from the
2 FAA to a specialized agency, the Transportation Security
3 Administration, with the passage of the Aviation and
4 Transportation Security Act of 2001. As with the original
5 Federal Aviation Act, Congress's stated purpose behind the
6 Act was the creation of a single, uniform system of
7 regulations for the safety and security of aviation to be
8 maintained by the federal government. I'm citing
9 147 Cong. Rec. H8300 to -314. And finally, the parties
10 direct the Court to 49 USC 44939, which legislated security
11 requirements related to pilot flight training. Those cases
12 reflect the competing issues about whether or not the
13 Federal Government has impliedly preempted the field which
14 is covered by the New York State Business Law.

15 I think it is easiest for me to say, in
16 summary, so that the parties understand the substance of my
17 ruling, that I concur with the rationale of the First and
18 Third Circuits.

19 I, therefore, find that as to the subject
20 matter of this case, implied preemption does apply, the
21 federal government has intended to preempt this field. I
22 decline to address whether or not there is conflict
23 preemption, but based upon my view that there is field
24 preemption, I grant the plaintiffs' motion for summary
25 judgment, and pursuant to the terms of the Declaratory

Aiport Owners/Pilots v. Cuomo, et al. - 06-CV-1468

14

1 Judgment Act, I find that the Federal Government has
2 preempted the field, the statute is unconstitutional and
3 unenforceable and I, therefore, grant the plaintiffs'
4 request for a permanent injunction.

5 MR. LEVINE: Thank you very much, your Honor.

6 MR. GOLDBERG: Thank you, your Honor.

7 THE COURT: This constitutes my decision. No
8 written opinion will be forthcoming. Therefore, the
9 transcript of these proceedings and the standard that I've
10 incorporated constitutes my decision. I wish the Circuit
11 well.

12 MR. GOGLIA: Thank you, your Honor.

13 THE COURT: Anything further I can do for the
14 parties? Thank you.

15 MR. LEVINE: Do we submit an order on this
16 or -- I'm not familiar with the federal practice in --

17 THE COURT: One's not necessary. In other
18 words, this constitutes the final decision and order.

19 MR. LEVINE: Very good. Thank you, your
20 Honor.

21 THE COURT: And what is it, 30 days in civil
22 law? The 30 days is runnin'.

23 (Court adjourned at 9:19 AM.)

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CERTIFICATION:

I, THERESA J. CASAL, RPR, CRR, Official Court
Reporter in and for the United States District Court, Northern
District of New York, do hereby certify that I attended at
the time and place set forth in the heading hereof; that I
did make a stenographic record of the proceedings held in
this matter and cause the same to be transcribed; that the
foregoing is a true and correct transcript of the same and
the whole thereof.

THERESA J. CASAL, RPR, CRR
Official Court Reporter

DATE:

